

WANG (Migration) [2018] AATA 1661 (24 May 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Zhen WANG
CASE NUMBER:	1614600
DIBP REFERENCE:	BCC2015/1876024
MEMBER:	Shane Lucas
DATE:	24 May 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 24 May 2018 at 3:45pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Genuine ongoing and continuous relationship – Married two months after first meeting – Co - habitation in different properties – Residential tenancy in joint names – Financial aspects – Shared day-to-day household expenses – Sponsor’s close relation with the applicant’s child – No plans for the future as a family – Credibility issues – Conflicting oral evidence about life events – Unsigned and undated letters of support from parents

LEGISLATION

Migration Act 1958 ss 5F, 65, 359A, 376,
Migration Regulations 1994 r 1.15A Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 24 August 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a Chinese national born on 21 September 1989. She applied for the visa on 30 June 2015 on the basis of her relationship with her sponsor. At the time of application, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) – and consequently, cl.820.221 – of the Regulations because the delegate was not satisfied the applicant was the spouse of the sponsor. The delegate considered that the evidence and information provided in support of the application was not sufficient to demonstrate that the applicant satisfied the definition of spouse under s.5F of the Act.
4. The applicant seeks review of the delegate's decision.
5. The applicant appeared before the Tribunal on 4 May 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. The applicant was not represented in relation to the review by a registered migration agent.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

Relevant law

8. Clauses 820.211(2)(a) and 820.221 of the Regulations require that at the time the visa application was made (and at the time of decision) the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together or not live separately and apart on a permanent basis [s.5F(2)(a)-(d)]. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household, and their commitment to each other as set out in r.1.15A(3).

CONSIDERATION OF CLAIMS AND EVIDENCE

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided the Tribunal with a certified copy of a Certificate of Marriage showing the marriage was made in Melbourne, Victoria on 4 May 2015. There is nothing to suggest the marriage is not valid. The Tribunal is therefore satisfied on the evidence that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

11. Is the sponsor an eligible person?

12. In the present case, the applicant claims to be the spouse of the sponsor. The parties provided documentation attesting that the sponsor (born in China on 25 July 1988) became an Australian permanent resident on 12 September 2013. Accordingly, the sponsor satisfies the requirements of cls.820.211(2)(b) and 820.221.

Are the other requirements for a spousal relationship met?

13. The applicants provided documentation and oral evidence to the Tribunal that was not available to the delegate. This information has been considered in making this decision.

14. Financial aspects of the relationship

15. The applicant provided documentation and gave oral evidence regarding the financial aspects of the relationship between the parties. The Tribunal received evidence of the couple's joint account with the Commonwealth Bank, opened on 4 May 2015, being the same date as their marriage ceremony. The documentation provided indicates that the account has been used for a range of transactions (e.g. payment of utility bills, groceries, rent), but the Tribunal was provided with no documentation indicating utilisation of the account beyond 10 August 2016. In a written statement (dated 12 August 2016) provided to the Tribunal, the applicant states that the sponsor's account card was stolen on 7 January 2016 and that for this reason, the couple prefer to pay their expenses in cash, rather than through electronic or card-based payment systems.
16. The Tribunal was also provided with documentation attesting to a National Australia Bank account in the sponsor's name and a letter to the applicant from the financial institution (dated 28 October 2016) providing her with a NAB Visa Debit card. The Tribunal was not provided with evidence that this debit card is linked to the sponsor's NAB account; however, it is noted that the documentation regarding the account contains no transactions for the period May 2016 to May 2017, with only a AUD 0.21 credit in balance for that period.
17. In oral evidence, the applicant stated that the couple's primary source of income is derived from the purchase and subsequent export to China of powdered milk formula for infants. The applicant stated that this is a cash-based source of income. The applicant and sponsor both stated that the sponsor is presently studying to be a National Accreditation Authority for Translators and Interpreters (NAATI)-accredited interpreter, and the sponsor confirmed that he has no other source of income.
18. The Tribunal was provided with utility bills in the sponsor's name from EnergyAustralia for the period March 2017 to March 2018 pertaining to a property in Elsternwick, Victoria; and for CityWestWater in joint names for the period February 2016 to July 2016 pertaining to a property in Melbourne (CBD), Victoria. The Tribunal was provided with a tenancy agreement

in joint names (dated 1 July 2016) and a Bond Receipt in joint names from the Residential Tenancies Bond Authority (dated 14 July 2016) relating to the former property.

19. In oral evidence, the applicant stated that the couple resided at the home of a friend in Broadmeadows, Victoria for a short period after April 2015; that they then resided in an apartment in Melbourne with two other persons (being friends of the sponsor) between June 2015 and July 2016; and that they have subsequently resided in Elsternwick, together with the applicant's son, born on 26 May 2016. In written statements and oral evidence provided to the Tribunal, the parties have both stated that the applicant's son is not the biological child of the sponsor nor has the sponsor adopted the child. The Tribunal notes also that the child is not included in this application as a dependent applicant.
20. On consideration of the evidence, the Tribunal finds that the parties have not pooled their financial resources to any significant extent, especially in relation to major financial commitments. The Tribunal finds no evidence of joint ownership of real estate or other major assets; no evidence of joint liabilities; and no evidence that one person in the relationship owes any legal obligation in respect of the other. The Tribunal finds some evidence that the couple share day-to-day household expenses such as utilities, rent and groceries, but finds that this evidence suggests the couple live together as persons under the same roof and not that they are in a genuine and committed spousal relationship.
21. The Tribunal therefore finds that the financial aspects of the relationship do not attest to the genuine and continuing spousal relationship between the parties.

22. Nature of the household

23. The Tribunal considered documentation and oral evidence regarding the nature of the parties' household. The applicant claims that she resided with the sponsor from April 2015 at a property in Broadmeadows, Victoria, the owner of which was a mutual friend who introduced the parties. The applicant claims the couple subsequently moved to a property in CBD Melbourne in July 2015, a property they shared with two other persons. As stated above, the applicant provided documentation in the form of a tenancy agreement in joint names (dated 1 July 2016) and a Bond Receipt in joint names from the Residential Tenancies Bond Authority (dated 14 July 2016) pertaining to a property in Elsternwick. The applicant claims that the couple have resided in this property since July 2016, together with the applicant's son.
24. In oral evidence, the applicant stated that she returned to the Elsternwick property in late May 2016 after the birth of her son in hospital in Carlton, Victoria on 26 May 2016. This is inconsistent with the claims of the parties relating to their periods of residence in Melbourne and Elsternwick, as they have claimed and documented that they did not take up residence at the Elsternwick property until July 2016. In response to a question from the Tribunal, the applicant claimed that the sponsor returned to the Elsternwick property on or around June 2016, after his return from China to attend the funeral of his grandfather. In oral evidence, the sponsor was unable to recall the dates of his travel to China or the birthdate of the applicant's son.
25. The applicant and sponsor gave conflicting oral evidence regarding the sleeping arrangements at the two-bedroom property in Elsternwick. The applicant stated that the couple sleep together in one bedroom and that her son sleeps in the bed with the couple. The applicant stated also that the sponsor frequently sleeps in the living room, as he is often studying late at night and does not wish to disturb her or her son. In response to a question from the Tribunal, the sponsor gave oral evidence that the child sleeps in bed between the parties and that the sponsor never sleeps in the living room.

26. In response to questions from the Tribunal, the applicant stated that the couple share the housework at their Elsternwick property, and that the sponsor undertakes the majority of the cooking. With regard to the care and support provided by the couple to the applicant's son, the applicant gave oral evidence that the applicant is a "better" parent than her. The applicant stated that the sponsor often reads to her son and provides regular care and attention to the child. In a written statement provided to the Tribunal (dated 3 March 2018), the sponsor stated:

27. *"I've learned that regardless of how hot and steamy a relationship is at first, the passion fades and there had better be something else to take its place. Our child [the applicant's son] has learnt to talking now and can call us Daddy and Mommy. When I heard him call me Daddy, still feel excited with joy. If I back at home late at night, he sometimes send me blow kiss and say good night. Even we are not biological father and son, at least two years we lived together... Anyone can lie in the world, but the whole world of the child is pure, clean and kind. For a two year old boy, he would not lie to anybody, our family tie is developed which the best way our relationship could be proved."*

28. On consideration of the evidence, the Tribunal finds that the living arrangements of the persons suggest that the couple live together as persons under the same roof, but do not attest to a genuine and continuing spousal relationship between the parties. The Tribunal finds that the couple share some responsibility for housework, and that the parties share some responsibility for the care and support of the applicant's son; however, while this latter finding may reflect that a bond has developed between the sponsor and the applicant's son over time, the Tribunal finds that this is an understandable reaction by a caring adult who lives under the same roof as a small child and comes to care for the well-being of said child. Further to this, the Tribunal notes that the sponsor was unable to recall the circumstances of his first meeting with the child or the child's date of birth. The Tribunal therefore finds that the relationship between the sponsor and the applicant's son is not reflective of a genuine and ongoing spousal relationship between the parties.
29. The Tribunal is therefore not satisfied that the nature of the parties' household attests to the genuine and continuing spousal relationship between the parties.

30. **Social aspects of the relationship**

31. The applicant provided documentation and gave oral evidence regarding the social aspects of the relationship between the parties. The Tribunal considered Statutory Declarations and letters of support from several third parties, including neighbours and merchants in Elsternwick (i.e. the local pharmacist and a member of her staff) and the respective fathers of both the applicant and the sponsor.
32. The Statutory Declarations provided by the couple's neighbours and merchants in Elsternwick contain high-level statements from declarants who evidently know the parties only superficially. The declarations do not provide any detail regarding the nature of the couple's relationship. The Tribunal therefore gives these declarations little weight in determining whether the relationship is viewed as a genuine and continuing spousal relationship in the opinion of the couple's friends and acquaintances.
33. The written statement from the applicant's father (dated 6 March 2018) makes no comment on the nature of the relationship between the parties, noting only that the applicant's family has been informed of the marriage and that there has been some telephone contact between the respective parents' of the couple. The written statement from the sponsor's father (dated 1 March 2018) states that he believes the relationship between the parties to be genuine and that he has had contact with the applicant through web video calls. The

statements are unsigned and provide no detail regarding the nature of the couple's relationship. Accordingly, the Tribunal gives these letters of support little weight in determining whether the persons represent themselves to others as being married to each other.

34. The parties also provided the Tribunal with a small number of photographs as evidence of the social aspects of their relationship. The majority of these photographs show the applicant, sponsor and the applicant's son together at tourist locations in Melbourne and at a McDonald's restaurant at an unspecified location. In oral evidence, the parties claim that they occasionally meet up with friends in Melbourne's CBD, but stated that they do not have friends come to their house for social occasions on a regular basis. The Tribunal gives little weight to the oral and photographic evidence provided in establishing the social aspects of the relationship or whether the parties plan and undertake joint social activities.
35. On the basis of the evidence, the Tribunal is not satisfied that the persons represent themselves to others as being married to each other; the Tribunal finds also that the couple do not plan and undertake joint social activities. The Tribunal also finds no substantive evidence that the relationship is viewed as a genuine and continuing spousal relationship in the opinion of the couple's friends and acquaintances.
36. The Tribunal is not satisfied that the social aspects of the relationship attest to the genuine and continuing spousal relationship between the parties.

37. Nature of the person's commitment to each other

38. The parties claim to have first met in March 2015 having been introduced by a person who was both a workmate of the applicant and a friend of the sponsor. The applicant stated that she was initially introduced by this mutual friend to another man as a potential "boyfriend" for her, but that she was not attracted to that person. The parties' mutual friend then introduced her to the sponsor and they commenced a relationship almost immediately. The couple moved in to the mutual friend's home in Broadmeadows in April 2015, and were married on 4 May 2015.
39. In response to a question from the Tribunal regarding the rapid inception of the couple's relationship, the applicant stated that she had not wanted to get married so promptly; however, she was encouraged to do so by her friend in Australia and by her parents in China. When asked by the Tribunal to confirm the date of her wedding, the applicant was initially unable to do so until she realised that the date of the Tribunal hearing (4 May 2018) was coincidentally the third anniversary of her wedding day.
40. The Tribunal finds that the applicant's explanation of the short timeframe (approximately six weeks) between her meeting, moving in with, and then marrying the sponsor, lacks credibility. The applicant was more than 25 years old at the time, had been married and divorced previously, and had been living independently in Australia for some ten months. The Tribunal finds that it is not credible that the applicant would enter into a genuine and continuing spousal relationship with a man she had known only a few weeks simply because she was encouraged to do so by her parents and a friend, especially as she had felt confident enough to divorce her first husband in June 2014, travel to Australia alone in July 2014, and refuse to consider the initial suitor proposed to her by her friend. Moreover, the Tribunal finds that the applicant's failure to promptly recollect the date of her marriage on the third anniversary of her wedding suggests the applicant did not commit to a genuine and continuing spousal relationship at the time of that marriage, and that consequently, the parties were not in a genuine and continuing spousal relationship at the time of application.

41. In oral evidence and written statements provided to the Tribunal, the applicant and sponsor detailed the circumstances of a separation between the couple in April 2016, and the sponsor's withdrawal of sponsorship for this application at that time. The applicant stated that in the months after their marriage in May 2015, the sponsor had been giving his attention to his studies and not to their relationship, and that the couple had been quarrelling frequently. At this time, the applicant went out socially with friends and was introduced to another man at a bar. The applicant stated that she became very drunk on the night in question and was subsequently physically intimate with a man she recollects only as "Vu". The applicant stated that she became pregnant as a result of this sexual encounter. The applicant stated that she did not inform the sponsor of her pregnancy until she was some eight months pregnant. When the applicant did advise the sponsor that she was pregnant and that he was not the father of the child, the parties claim the sponsor became very angry and left their home.
42. On 11 April 2016, the sponsor advised the Department in writing that he was withdrawing his sponsorship for this application. Around this time, the sponsor claims to have travelled to China to visit family and to attend the funeral of his grandfather. On 10 May 2016, the sponsor advised the Department that the couple was still in a genuine and continuing relationship, and that the circumstances of the separation and the applicant's pregnancy by another man was effectively his fault as he had "spent so much time on part time work and full time studies" and had to "some extent ignored my wife".
43. The sponsor stated that he remained in China at the time of the applicant's son birth on 26 May 2016, but in written statements and oral evidence, has stated that he regards the child as his own. Notwithstanding the sponsor's claimed close relationship with the applicant's son however, the Tribunal notes that the sponsor could not recall the child's birthday or provide a credible account of when and in what circumstances he first met the child on his return from China after the child's birth. The Tribunal was not provided with a copy of the child's birth certificate, but the applicant advised that only her name appears on the document and that the father's identity is listed as "unknown".
44. On consideration of the evidence, the Tribunal finds that the parties have lived together as persons under the same roof for some three years in three separate properties since April 2015; in two instances sharing a home with other persons; and since July 2016, living together with the applicant's son as persons under the same roof in a property in Elsternwick. The Tribunal does not find that this period of cohabitation as persons under the same roof – and hence the length of time the couple claim to have lived together - attests to a genuine and continuing spousal relationship between the parties.
45. The Tribunal accepts that the sponsor has formed a bond with the applicant's infant son. However, while the sponsor's apparent care and support for the applicant's son may provide the applicant with a degree of practical support – such as might be provided by a friend or housemate - it does not attest to the degree of companionship and emotional support that the persons draw from each other, or reflect a genuine and continuing spousal relationship between the parties.
46. In response to questions from the Tribunal, the applicant indicated that her principal plan for the future is to be able to travel freely and to return to visit her family in China. The sponsor stated that his plans for the future principally involve completing his studies and qualifying as a NAATI-accredited interpreter. Neither the applicant nor the sponsor provided evidence suggesting that they have made considered or serious plans for the future as a couple or a family. Accordingly, the Tribunal finds that the persons do not see the relationship as a long term one.

47. The Tribunal is not satisfied that the nature of the persons' commitment to each other attests to a genuine and continuing spousal relationship between the parties.

48. **Other matters for consideration**

49. On 22 February 2018, the Tribunal wrote to the applicant and provided a copy of a *Certificate and Notification regarding the Administrative Appeals Tribunal's discretion to disclose certain information under s.376 of the Migration Act 1958* held on the applicant's Departmental file. The Tribunal provided the applicant with the opportunity to comment on the validity of the certificate and – pursuant to s.359A of the Act – gave the applicant to opportunity to comment or respond to the adverse information relevant to the Certificate, namely that the Department had received an anonymous allegation on 10 September 2015 that the relationship between the parties is contrived for the purposes of obtaining permanent residence in Australia.

50. In response, the sponsor provided the Tribunal with a written statement (dated 3 March 2018) stating the following:

51. *"For this anonymous information, I have different opinion. I should have known the person and probably think known her pretty well due to she was my ex-wife. In my last marriage, we used to have often quarrel and fight with each other. Both of us carried out full responsibility for the break-up of our marriage. At that time, we were too young to motivate us to behave in irrational ways. Because of this broken marriage, my ex-wife and her family developed hatred for me. She ever said, if she would not make a better life after then, I will not be allowed to having a happy marriage. No matter what happens, I must admit that there are fleeting moments when I recognize their curse to me and always seemed against me. Even though after her back in China, her family continued to asking compensations for emotional distress. Of course I refused their compensation claim, our marriage already broken up, and definitely won't be continued."*

52. Pursuant to s.359AA of the Act, the Tribunal also put this adverse information to the applicant during the course of the hearing on 4 May 2018. In response, the applicant also stated that she believed the anonymous allegation to have been made by the sponsor's ex-wife as part of her efforts to obtain money from the sponsor.
53. In considering this potentially adverse information, the Tribunal notes that the allegation was made anonymously in September 2015; contains no evidence or detail of substance; and cannot be tested by the Tribunal. Accordingly, the allegation is given no weight in determining this application or considering the nature of the relationship between the parties.

54. **Conclusion**

55. On the basis of the above findings, the Tribunal is not satisfied that the requirements of [s.5F(2)(a)-(d)] are met at the time the visa application was made and at the time of this decision.
56. Therefore, the applicant does not meet cl.820.211(2)(a) and cl.820.221.
57. The Tribunal is satisfied that the applicant does not meet the requirements of cls.820.211(7), 820.211(8) or 820.211(9); and hence does not meet the requirements of cls.820.221(2) and 820.221(3).
58. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

59. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Shane Lucas
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).